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## United Nations Commission on International Trade Law

### CASE LAW ON UNCITRAL TEXTS (CLOUT)

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## Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide ([A/CN.9/SER.C/GUIDE/1/REV.3](#)). CLOUT documents are available on the UNCITRAL website: ([www.uncitral.org/clout/showSearchDocument.do](http://www.uncitral.org/clout/showSearchDocument.do)).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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**Cases relating to the United Nations Convention on Contracts for the  
International Sale of Goods (CISG)**

**Case 1741: CISG [1] 81; 86; 87<sup>1</sup>**

People's Republic of China: High People's Court of Zhejiang Province

(2014) Zhe Shang Wai Zhong Zi No. 48

20 August 2014

Original in Chinese

Published in Chinese: China Foreign-related Commercial and Maritime Trial

Available at: <http://ccmt.org.cn>

In early 2008, a Chinese seller and a Korean buyer entered into a contract for the sale and purchase of steel plates intended for ship-building. Both parties agreed that the destination port would be in India, that any disputes would be settled by an arbitral tribunal seated in Hong Kong, and that the tribunal's decision would be binding. Subsequently, the Korean company entered into a separate contract to supply the Chinese steel plates to an Indian company. The Chinese company was aware of the latter contract.

In October 2008, the Chinese seller delivered the steel plates to the Indian port. Based on a test report, the Indian company found that the steel plates were defective. In May 2009, the Korean buyer refused to accept delivery of all goods and commenced arbitration against the Chinese seller in Hong Kong. Meanwhile, arbitration took place between the Korean buyer and the Indian company in Singapore, where the arbitral tribunal found that the Korean company was obliged to pay damages to the Indian company arising from the defective steel plates. In addition, the arbitral tribunal held that the Indian company was required to store the steel plates properly and to return them to the Korean company upon settlement of the dispute between the Chinese and Korean companies. Following the Singapore tribunal's decision, the Hong Kong tribunal held that the Chinese seller had committed a deliberate breach of contract, and as a result, the Korean buyer was under no obligation to mitigate its damages. Accordingly, the Korean buyer was entitled to compensation from the Chinese seller. However, the tribunal considered that it did not have jurisdiction to rule on the Chinese seller's application for the goods to be returned.

In 2011, the Korean buyer applied to the first instance court in China to enforce the Singapore tribunal's decision. The Chinese seller also sued the Korean buyer in the same court for the return of the goods. Although there was no dispute about the jurisdiction of the court over the Chinese seller's claim, the issue arose as to whether the CISG was applicable to the case. The court held that the CISG was indeed applicable, since China and Korea were both Contracting States to the Convention, and the application of the CISG was not excluded by the contract between the Chinese and Korean parties. The court further observed that the Hong Kong tribunal had cited the Convention in its decision, thus confirming that the CISG was applicable to this case. Applying Articles 86 and 87 CISG, the court noted that the Korean buyer should first pay the Indian company for warehouse expenses incurred for storage of the steel plates in India, before it was entitled to compensation from the Chinese seller. As to the Chinese seller's claim, the court reasoned that, under Chinese law, only the Korean buyer was entitled to demand the return of the goods from the Indian company, and therefore it had no jurisdiction over the claim.

Both parties appealed against the first instance decision. The issues on appeal included: whether the CISG was applicable to this case; whether the Korean buyer was obliged to return the defective steel plates to the Chinese seller; and whether the Chinese seller had to first pay the Korean buyer the warehouse expenses for storage of the steel plates in India. The appeal court held that, according to Article 81 CISG, the Chinese seller was entitled to require the Korean buyer to return the steel plates

<sup>1</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

after paying for the warehouse expenses. As both parties had agreed on CFR (Cost and Freight) shipping terms, the Korean buyer was obliged to assist the Chinese seller in transferring the steel plates back to China, but the costs resulting from the transfer were to be borne by the Chinese seller. Further, according to Article 86 CISG, the Korean company was entitled to be compensated by the Chinese seller for reasonable expenses incurred in storing the goods in the warehouse, before assisting with the return of the goods to the Chinese seller. On appeal, the Chinese seller also claimed that the Korean buyer was obliged to pay the full contractual price of the goods, since the steel plates were damaged during their storage in the warehouse in India. The Korean buyer refused to make any payment since it considered that the steel plates delivered by the Chinese seller were defective. In this regard, the appeal court observed that any issue of reduction in compensation would involve a third party, namely, the Indian company, and was therefore an issue beyond its jurisdiction. As a result, the first instance decision was upheld.

**Case 1742: CISG 1; [6]; 35(1)<sup>2</sup>**

People's Republic of China: High People's Court of Tianjin Municipality

(2013) Jin Gao Min Si Zhong Zi No. 91

25 November 2013

Original in Chinese

Published in Chinese: China Foreign-related Commercial and Maritime Trial

Available at: <http://ccmt.org.cn>

In 2011, a Canadian buyer (the plaintiff) entered into a contract with a Chinese company for the sale and purchase of chemical products. Under the contract, the buyer would pay 10 per cent of the total purchase price upfront and the remaining 90 per cent upon receipt of independent third-party reports attesting to the quality of the goods. The contract also dealt with packaging, inspection, consequences for breach of contract, amongst other things. The buyer first paid 10 per cent of the total purchase price, and later paid a further 48.35 per cent of the outstanding purchase price to the seller. Subsequently, the seller, together with a third party "Z", provided the buyer with a letter of guarantee in respect of the chemical products which were partly delivered, stating that the products fulfilled quality requirements. In 2012, the Chinese seller was liquidated and struck off. At the time, it had been wholly owned by a Chinese national "P" (the defendant).

The buyer, however, alleged that the seller had breached their contract by failing to deliver goods in conformity with the contract, and sued P, as the sole shareholder of the defunct seller, for the return of the paid portion of the purchase price.

At first instance, the court held that, since the parties agreed to the application of Chinese law, in accordance with the rules of private international law, the dispute should be governed by Chinese law. The court dismissed the buyer's claim because it found that the buyer failed to discharge its burden of proving that the goods did not satisfy the quality required by the contract. However, the value of the goods delivered by the seller had been lower than the amount paid by the buyer. Under Chinese company law, a sole shareholder would assume the liabilities of his wholly owned company if his business assets could not be distinguished from his personal assets. Since P could not prove that his business and personal assets were separate, the court ordered P to return the difference in value to the buyer.

The buyer appealed against the court's dismissal of its claim for the return of the full amount paid, and adduced new evidence to prove that the goods fell short of the quality required by the contract. P also appealed against the court's decision, claiming that shipping fees were payable by the buyer and therefore he should not have been ordered to pay the difference in value to the buyer.

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<sup>2</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

The appeal court held that, since the buyer and the seller were respectively located in Canada and China, which were both Contracting States to the CISG, and the contract did not exclude the application of the CISG, the dispute ought to be governed by the CISG. As to the consequences of the Chinese seller's liquidation, in accordance with the rules of private international law, the court would apply Chinese law as chosen by the parties. Regarding the buyer's claim, the court affirmed the findings made at first instance. Applying Article 35(1) CISG, the court held that the buyer failed to prove that the goods were not of the quality required by the contract. The court reasoned that the buyer had accepted the goods without requiring inspection by a third party as stipulated in the contract, and the new evidence adduced by the buyer was inadmissible. The court also confirmed the first instance ruling that, under Chinese law, P, as the sole shareholder, was responsible for the seller's liabilities following its liquidation. As to P's claim that the amount he was ordered to return to the buyer was covered by shipping fees payable by the buyer to the seller, the court found that there was no basis to P's claim. Accordingly, both appeals were dismissed, and the first instance decision was upheld.

**Case 1743: CISG [1]**<sup>3</sup>

United States: District Court for the District of Arizona

*Adonia Holding GmbH v. Adonia Organics LLC*

16 December 2014

Original in English

Available at: <http://cisgw3.law.pace.edu>

Abstract prepared by Matthew VanDyke and Harry M. Flechtner, National Correspondent

In an action arising from an alleged breach of a distributorship agreement, a United States federal district (trial) court applied United States municipal contract law instead of the CISG.

A supplier located in the United States and a distributor located in Austria entered in a written distributorship agreement ("the Agreement"). The Agreement provided that the distributor would be given the exclusive right to sell the supplier's products in Eastern Europe. The Agreement did not contain a minimum quantity of goods to be purchased by the distributor, nor did it specify the price of the goods or the types of goods that were to be sold.

Following the execution of the Agreement, the distributor became aware that a Germany-based reseller had begun selling the supplier's products in Eastern Europe. The distributor sent several emails to the supplier, notifying it of the reseller's actions and requesting that the supplier intervene. Although the supplier notified the reseller that it should cease selling the products, the reseller did not comply with the requests. The supplier failed to make any further efforts to stop the resales, and did not pursue any legal remedies against the reseller. The distributor sued the supplier for breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment. The supplier filed a motion to dismiss the distributor's lawsuit for failure to state a cognizable legal claim.

The court held that United States municipal law, and not the CISG, governed the parties' Agreement. The court asserted that "there is very little case law on the applicability of the CISG to distributorship agreements," but it found that courts considering the question "have either held or suggested that the CISG does not govern distributorship agreements, which entail much more than the simple sale of goods." The court noted that past court decisions dealing with the issue have, at the very least, stood for the proposition that "an agreement must specify the price or types of goods to be sold before the CISG will apply." Because the Agreement did not specify the price for the goods or the type of goods to be sold, the court held that the CISG did

<sup>3</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

not govern the Agreement. In its discussion of the distributorship issue, the court cited only decisions by United States courts.

In *dicta* in a footnote, the court suggests that a choice-of-law provision in a contract document signed by both parties might be sufficient to exclude application of the CISG if it designates the law of a particular United States State, even if the clause does not otherwise indicate exclusion of the Convention.

**Case 1744: CISG 8; 14; 18(1); 19; 19(3); 71<sup>4</sup>**

United States: District Court for the Western District of Pennsylvania

*Roser Technologies, Inc. v. Carl Schreiber GmbH*

10 September 2013

Original in English

Available at: <http://cisgw3.law.pace.edu>

Abstract prepared by Matthew VanDyke and Harry M. Flechtner, National Correspondent

A buyer located in the United States and a seller located in Germany entered into two supply contracts for the manufacture and sale of copper mold plates. After entering into the contracts, the seller notified the buyer that the seller's credit insurance coverage for buyer's payment had been cut, and insisted that the buyer secure a letter of credit or expedite payment. The buyer sued the seller in U.S. federal district (trial) court for breach of contract. The seller filed a counterclaim, alleging that the buyer repudiated the contract.

One issue before the court was whether the seller's terms and conditions had been incorporated into the parties' contracts. To decide the issue, commonly referred to as "a battle of the forms," the court analyzed the document exchanges that gave rise to the formation of the contracts. For both contracts, the seller sent the buyer a price quotation that referenced the seller's standard terms and the web address at which those terms could be found; the price quotations included the following language: "According to our standard conditions of sale to be found under [www.csnmetals.de](http://www.csnmetals.de), we have pleasure in quoting without engagement as follows."

The buyer responded by sending the seller a purchase order per the price quotation; in response the seller sent the buyer an order confirmation. The order confirmations included the following language: "We thank you for your purchase order. This order confirmation is subject to our standard conditions of sale as known [www.csnmetals.de](http://www.csnmetals.de)." The seller's standard conditions of sale provided, among other things, that "[s]upplies and benefits shall exclusively be governed by German law. The application of laws on international sales of moveable objects and on international purchase contracts on moveable objects are excluded." The seller's documents also included the following language: "If we have offered a payment target, a sufficient coverage by our credit insurance company is assumed. In case this cannot be obtained we have to ask for equivalent guarantees or payment in advance."

The seller argued that the buyer's purchase orders were offers and the seller's order confirmations were rejections and counteroffers. The seller also argued that if the court deemed its order confirmations as acceptances to the buyer's offer, then the purchase order (the offers) included the seller's standard conditions via reference to the seller's price quotations. In contrast, the buyer argued that its purchase orders were offers that did not include the seller's standard conditions by reference, and that the seller's order confirmations were acceptances of the buyer's offers.

To resolve the dispute, the court first undertook a choice-of-law analysis to determine whether there was a conflict between the (United States) UCC and CISG. The court found that under UCC § 2-207, standard conditions are incorporated by reference into a contract if they do not result in surprise or hardship to the party against whom

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<sup>4</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

enforcement is sought. In contrast, the court found that Article 19 CISG generally adopts the “mirror image rule,” under which the terms of the contract are those embodied in the last offer. Thus, under Article 19 CISG, an acceptance with material different standard conditions is not an acceptance, but rather a rejection and counteroffer. Furthermore, the court found that under Articles 8 and 14 CISG, standard conditions referenced by a party are incorporated into the contract only if the other party had reasonable notice of the attempted incorporation. The court thus found that there was a conflict between the CISG and the UCC. The court noted that the seller attempted to derogate from the CISG pursuant to Article 6 by including language in its standard terms providing that the transaction was governed by “German law” and stating that “application of laws on international sales of moveable objects and on international purchase contracts on moveable objects are excluded.” The court held, however, that the attempted derogation was ineffective because the seller did not explicitly mention the CISG and neither party had argued to the court that German municipal law governed the transactions. Because the States of both the buyer and the seller were signatories to the CISG, the court held that the Convention governed the agreements.

Applying Article 8 CISG, the court found that the buyer’s purchase orders did not incorporate the seller’s standard conditions: citing an Austrian Supreme Court decision, the court explained that “standard terms, in order to be applicable to a contract, must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent.” [*Tantalum Powder Case*, 17 December 2003, CLOUT case No. 534.] The court found that the buyer did not intend seller’s standard conditions to be incorporated into its purchase order/offers as those purchase orders included provision that were different from the seller’s standard terms. The court then found that the seller’s reference to its standard conditions in its order confirmations did not suffice to incorporate those terms into the order confirmations. The court found that the language included on the order confirmations was “ambiguous at best,” as the language merely directed the buyer to a website that needed to be navigated in order for the standard conditions to be located. Furthermore, the court found no evidence that the buyer had actual knowledge of the attempted inclusion of the standard conditions, nor evidence that the parties discussed incorporation of the standard conditions during contract negotiations. Finally, no employees of the seller initialed the statement attempting to incorporate the standard conditions. Because neither the purchase orders nor the order confirmations incorporated by reference the standard conditions, the court held, the standard conditions were not part of the contracts.

Although the seller’s standard conditions shown on its web site were not a part of the parties’ agreement, the court nevertheless found that the language in the seller’s documents that expressly required credit insurance coverage for the buyer’s payments was properly incorporated into the contract. The court explained that this “language did not reference any other document but rather was an independent additional term under Article 19 of the CISG.” This language, furthermore, was material under Article 19(3) CISG because it related to payment terms for goods. Because this material additional term was properly incorporated into the seller’s order confirmations, the order confirmations constituted counteroffers rather than acceptances.

The court next decided whether the buyer accepted the seller’s counter-offers, including the seller’s language permitting the seller to demand advance payment or guarantees in the absence of credit insurance for the buyer’s payment. Applying Article 18(1) CISG, the court found that the buyer accepted the first of the seller’s offers when it emailed the seller stating that it had reviewed the order confirmations and that the seller could “proceed with the manufacture of the plates.” The court found that the buyer accepted the seller’s second offer when it provided drawings as

instructed by the seller and confirmed compliance with the instructions via email — making no statement that it was not accepting the additional terms.

Throughout its discussion of the CISG, the court recognized that “[w]hen [American Courts] interpret treaties, [they] consider the interpretations of the courts of other nations” (quoting a concurring opinion in a United States Supreme Court decision). The court also cited a variety of German decisions, including the decision of the German Supreme Court VIII ZR 60/01, 31 October 2001 (see CLOUT case No. 445); it recognized that “it is appropriate to consider commentaries when interpreting treaties” and it cited a variety of commentaries on the CISG.

Having determined that, under the CISG, the buyer accepted the seller’s counter-offers that required payment guarantees or advance payment should the seller’s credit insurer deny coverage of the buyer’s payment, the court held that the buyer repudiated the contract when it refused performance following the seller’s demand for such guarantees or advance payment. Applying Article 71 CISG, the court found that there was no dispute that the buyer refused to perform on the contract, as the buyer sent the seller a letter stating that it would procure the goods from an alternate supplier. The court concluded that “[i]t is hard to imagine a clearer repudiation,” and it held that the buyer had breached its contractual obligations.

**Case 1745: CISG 4<sup>5</sup>**

United States: District Court for the District of New Jersey  
*Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging, Inc.*  
19 March 2012  
Original in English  
Available at: <http://cisgw3.law.pace.edu>

Abstract prepared by Matthew VanDyke and Harry M. Flechtner, National Correspondent

This decision turns on the limited scope of the CISG under Article 4 thereof, as well as the importance of agency law in determining the applicability of the Convention.

A buyer located in the United States purchased a photograph printing and processing machine manufactured by a firm located in Italy. In purchasing the machine, the buyer dealt with a company located in the United States that had acquired the machine from the Italian manufacturer. The buyer alleged that the machine was defective and not suitable for its advertised purpose. The buyer sued the Italian manufacturer, as well as the United States firm with which it dealt and that firm’s president; the buyer alleged that its claims against the Italian manufacturer were governed by the CISG, arguing that the United States firm with which it dealt (and its president) acted as agents for, and entered into the sales contract on behalf of, the Italian manufacturer. The Italian manufacturer moved to dismiss the buyer’s claims against it.

Applying United States domestic agency law, the court concluded that the buyer had not sufficiently alleged that the United States firm with which the buyer dealt had acted as an agent for the Italian manufacturer; thus, the court concluded, there was no contractual relationship between the United States buyer and the Italian manufacturer. Citing United States decisions and Article 4 CISG, the court held that “because the CISG does not address the rights of third-parties, the treaty does not provide a cause of action for remote purchases but also does not preempt applicable [municipal law] that otherwise governs the rights of remote purchasers.” Because the buyer and the Italian manufacturer did not have a direct contractual relationship, furthermore, the court also held that a forum selection clause in the owner’s manual issued by the Italian manufacturer did not bind the buyer. Nevertheless, as the buyer had not entered into a contract with the Italian manufacturer, the court dismissed the buyer’s CISG claims against the manufacturer.

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<sup>5</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

**CLOUT 1746: CISG 74; 76<sup>6</sup>**

United States: District Court for the Eastern District of Missouri, Eastern Division  
*Semi-Materials Co. v. MEMC Elec. Materials, Inc.*

10 January 2011

Original in English

Available at: <http://cisgw3.law.pace.edu>

Abstract prepared by Matthew VanDyke and Harry M. Flechtner, National Correspondent

The buyer, a Korean corporation, sued the sellers, United States corporations, for breach of contract and fraud. The buyer alleged that the parties entered into a contract for the sale of goods and that the sellers failed to deliver a portion of the goods within a commercially reasonable time. The buyer sought damages under Articles 74 and 76 CISG, respectively. The sellers filed a motion with the court to exclude the testimony of one of the buyer's expert witnesses, whom the buyer called in support of the amount of the compensatory damages the buyer claimed. The sellers argued that the methodology used by the expert witness to calculate the damages was legally flawed because the expert witnesses wrongfully applied Article 76 CISG to calculate damages; the sellers argued that the expert should have instead applied only Article 74 CISG to calculate the damages.

The court explained the difference between Articles 74 and 76 CISG: Article 74 governs compensatory damages and provides the measurement of damages where a breach of contract is found; Article 76 addresses circumstances where a contract has been avoided. Regarding the application of Articles 74 and 76, the court stated:

In circumstances where there is a breach of contract and there is no avoidance of the contract by either party, only Article 74 applies with respect to the measure of damages. However, where there is an avoidance of a contract, the plain language of Articles 75 and 76 of the CISG permit a party to recover damages as measured thereunder, "as well as any further damages recoverable under Article 74." As such, in circumstances where a contract is found to have been avoided, Articles 74 and 76 are not mutually exclusive remedy provisions. Instead, a party may recover under article 76 *and*, in appropriate circumstances, Article 74.

Because both the evidence and the buyer's arguments demonstrated that the buyer contended that the sellers avoided the contracts, the court held that the buyer was not limited to seeking damages solely under Article 74 but was also permitted to seek damages under Article 76. Therefore, the buyer was not precluded from presenting expert testimony as to Article 76 damages and the sellers' motion was denied.

**Case relating to the United Nations Convention on Contracts for the  
 International Sale of Goods (CISG) and to the Convention on the  
 Limitation Period in the International Sale of Goods (unamended text, 1974)  
 (Limitation Convention)**

**Case 1747: CISG [1]; Limitation Convention 3(1)(b); 8; 10(2); 13; 18(2); 18(3)**

Austria: Higher Regional Court Vienna

1 R 192/16m-24

23 January 2017

Original in German

The plaintiff is a producer and vendor of lamps with place of business in Poland. In 2008, it sold lamps to the defendant, whose place of business is in Austria, who then resold them to a sub-purchaser, also with place of business in Austria. At a later time, defects were found in the lamps, which the seller unsuccessfully tried to remedy. In June 2011, the buyer initiated judicial settlement proceedings before a Polish court to

<sup>6</sup> This case is cited in the CISG Digest, 2016 Edition, available at [www.uncitral.org/](http://www.uncitral.org/).

safeguard its action of recourse related to the defective goods. While the proceedings ended without a settlement in September 2011, the buyer argued that under Polish law the three-year period of limitation started anew at the conclusion of the proceedings. Since the defects persisted, the sub-purchaser repaired the lamps and in March 2012 sued the buyer for compensation of the repair costs. In June 2012, the buyer informed the seller of that lawsuit and of the possibility of joining it as well as of possible legal consequences in case the seller did not join in the suit. The seller did not join in the suit. In 2014, the lawsuit ended in a settlement in which the buyer agreed to pay EUR 30,000 to the sub-purchaser.

Later in 2014, the buyer ordered a number of different products from the seller for a total price of EUR 26,743.59. When the seller demanded payment in May 2014, the buyer declared it would offset the price of the goods against the payment the buyer had made to the sub-purchaser as part of the settlement agreement, and that therefore it would make no payment to the seller. In March 2016, the seller initiated proceedings against the buyer for the purchase price before the Landesgericht (*Land Court*, i.e. the court of first instance)<sup>7</sup> in Wiener Neustadt, Austria. The seller argued that the buyer's offsetting claim was time-barred on grounds of the Limitation Convention (Lim Conv) and that due to the prevalence of that Convention over national Polish law, the settlement proceedings under Polish law before the Polish court did not suspend the running of the limitation period.

The court of first instance held that the 2008 and 2014 contracts between the parties were governed by the CISG. Legal aspects outside the scope of the CISG were, pursuant to Article 4 Rome I Regulation or its predecessor, governed by Polish law. Therefore, the court found the Limitation Convention to be applicable pursuant to its Article 3(1) (b). Furthermore, it found that pursuant to Articles 8 and 10(2) Lim Conv, the four-year limitation period had expired in 2012. Regarding the judicial settlement proceedings before the Polish court, the court qualified those proceedings as relevant proceedings under Article 13 Lim Conv. Since the settlement proceedings had ended without a decision on the merits, the court applied Article 17(2) Lim Conv, indicating that the buyer would have had to assert its claim within one year from the end of the proceedings, which it had failed to do.

The court also considered that in accordance with Articles 18(2) and 18(3) Lim Conv the buyer could have asserted its claim during another one-year period beginning with the entry into legal effect of the settlement between the buyer and the sub-purchaser in February 2014. The Court specified that Article 18(2) Lim Conv does not require the relationship between the buyer and the sub-purchaser to be international; rather, a contractual relationship between domestic parties is sufficient.

However, in the view of the court, systematic considerations of Article 25 Lim Conv in connection with Article 18(3) Lim Conv implied that Article 18(3) required a judicial assertion of claims, not only an extrajudicial offsetting. Since the buyer had only pursued the latter, this one-year period did not benefit the buyer. The court ruled that therefore, the claim brought forward by the buyer was time-barred and that the buyer could not offset the seller's claim pursuant to Article 25(2) (b) LC.

The buyer appealed. The court of appeals confirmed the applicability of the CISG. While the court expressed doubts concerning the applicability of the Limitation Convention, it found that the issue of its applicability would need to be addressed only if under the Limitation Convention the claim brought forward by the buyer was actually time-barred; i.e. if the ruling of the court of first instance concerning the statute of limitations was upheld.

Concerning limitation, however, the court of appeals found that the assumption that Article 18(3) Lim Conv required a judicial assertion of claims rather than an extrajudicial assertion, such as an offsetting, was supported neither by the wording nor by systematic considerations. In the view of the court, this constituted an error of

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<sup>7</sup> Wiener Neustadt Land Court, 26 Cg 47/16s-17, 3 October 2016.

law that necessitated the repeal of the first instance ruling. Moreover, the court of appeals ruled that the offsetting was permissible pursuant to Article 25(2) (b) Lim Conv, on the grounds that the buyer's claim for compensation and the seller's claim for purchase price payment could have been set off at the time when the running of the limitation period had been suspended for one year pursuant to Article 18(3) Lim Conv.<sup>8</sup>

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<sup>8</sup> The case was further heard by Austria's Supreme Court. The Supreme Court found the recourse inadmissible, stating that the interpretation of a convention not ratified by Austria could not be qualified as a significant question of law as required by section 502(1) of the Austrian Code of Civil Procedure and therefore did not fall within the jurisdiction of the Supreme Court. See, Supreme Court (Oberster Gerichtshof) Ob55/17k, 10 May 2017.